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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1972

NO. 72-448

BILLY WEST DASHER,

Petitioner,

V.

JOHN A. BLACKMON, COMMISSIONER, STATE DEPARTMENT OF REVENUE, and LOWNDES COUNTY, GERGIA, and FRANK S. STEELE, FOREMAN OF LOWNDES COUNTY GRAND JURY, SEPTEMBER TERM, 1970,

Respondents

Response To

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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BILLY WEST DASHER, Petitioner

Vs.

JOHN A BLACKMON, COMMISSIONER, STATE DEPARTMENT OF REVENUE, and LOWNDES COUNTY, GEORGIA, and FRANK S. STEELE, FOREMAN OF LOWNDES COUNTY GRAND JURY, SEPTEMBER TERM, 1970.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA, BY LOWNDES COUNTY, GEORGIA and FRANK S. STEELE, FOREMAN OF LOWNDES COUNTY GRAND JURY, SEPTEMBER TERM, 1970

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TABLE OF STATUTES

In addition to the statutes set forth in Petitioner's brief, the follow-int statutes are involved in a determination of the case sub judice:

GEORGIA LAWS 1889, p. 52; Acts 1823, Cobb 1025 (GA. CODE ANN. §92-5504)

> "State Revenue Commissioner to issue executions against collector and sureties on default. If any collector shall fail to settle his accounts with the State Revenue Commissioner in terms of the law, he shall issue execution against such collector and his sureties for the principal amount, with interest at the rate of 20 per cent per annum on said amount: Provided, that if upon a final settlement it shall appear that said collector was entitled to credits at the time he is required by law to settle, the Commissioner may allow the same, and charge interest only on the amount for which the collector is in default, together with all the costs and attorney's fees incurred by reason of the issuance of said execution."

GEORGIA LAWS 1915, p 55 (GA CODE ANN. § 92-5505)

"Affidavit of illegality to execution against tax collector and sureties. - Whenever the State Revenue Commissioner shall issue an execution against any defaulting tax collector and the sureties on his official bond, as set forth in section 92-5504, the tax collector or any surety on his bond may, at any time after the issuance of said execution and before a sale thereunder, file an affidavit of illegality to said execution, which affidavit shall state any matters of defense which would be available in denial either of the alleged default or the amount thereof as stated in the execution, and which affidavit shall be returned to be tried in and disposed by the superior court of the county in which the tax collector held office, in the same manner as provided by law for the trial and disposition of such issues generally."

GEORGIA LAWS 1895, p.63 (GA. CODE ANN. §89-9907).

"Malpractice, oppression and tyrannical partiality.- Any ordinary, member of any board of commissioners, county judge, or justice of the peace, who shall be charged with mal-

practice in office, or with using oppression or tyrannical partiality, or with wilfully refusing or failing to preside in or hold his court at the regular terms thereof or when it is his duty under the law to do so, or with using any other means to delay or avoid the due course or proceeding of law, or with any other conduct unbecoming the character of an upright magistrate, or who shall wilfully and knowingly demand more cost than he is entitled to by law, in the administration and under color of his office, shall be punished as for a misdemeanor and shall be removed from office."

GEORGIA LAWS 1863-63, pp.72,73 (GA. CODE ANN. §23-1501).

"Every county as body corporate. - Every county is a body corporate, with power to sue or be sued in any court."

CODE OF GEORGIA, 1933, §23-1502 (GA. CODE ANN. §23-1502).

"When county liable to suit. - A county is not liable to suit for any cause of action unless made so by statute."

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I. STATEMENT OF THE CASE

In paragraph 2 of petitioner's Statement of Facts, it is alleged that the Grand Jury of Lowndes County imposed a "penalty or fine" against the petitioner, (Petitioner's Brief, p. 9). While it is true that the term "penalize" was used in the Grand Jury presentments, the amount provided by the presentments was, rather, a forfeiture, as set forth in the applicable code section.

In paragraph 4 of petitioner's Statement of Facts, it is alleged that the petitioner was not afforded an opportunity to be present in the grand jury room during presentment of evidence and that he was not afforded an opportunity to appear with counsel at any time during which the grand jury had the matter under

consideration, the implication being that he was totally unaware of the question being considered. As a matter of fact, however, presentments had been made by grand juries prior to the September, 1970, term, noting the matter of outstanding delinquent taxes. No specific reference was made to any appearance of the Petitioner before grand juries prior to the September, 1970, term, but the petitioner had appeared before the previous grand juries and his appearance before the Grand Jury for the September, 1970, term is specifically noted in the presentments for that term and, by reference, incorporated into the judgment of Lowndes Superior Court. (Petitioner's Brief, Appendix, p. 7B). The respondents wish to emphasize, as is pointed out by the Petitioner, that neither the Lowndes County Superior Court nor the Supreme Court of Georgia passed upon the constitutional issues. (Petitioner's

Brief, p. 11).

The remaining facts necessary for a determination of the instant case are essentially as outlined by the Petitioner.

SUMMARY OF ARGUMENT

I. There being no substantive federal question involved in the instant case, and there having been no determination of any constitutional questions by the lower courts, this Court should deny the Writ of Certiorari. Pages 6-10

II. There was no final determination of liability of the Petitioner, Billy West Dasher, at the time of the action of the September, 1970, Grand Jury, and there was, therefore, no denial of due process to the Petitioner. Pages 11-26

III. Lowndes County having had no control over the proceedings of the September 1970, Grand Jury, and no control over the proceedings subsequent to the action of the September, 1970, Grand Jury, it was not a proper party to the instant case. P.26-32

IV. The law under which the September, 1970, Grand Jury acted being available to all grand juries in Georgia, and

the law also being applicable to all Tax Commissioners or Tax Collectors in the State of Georgia, the mere enforcement of the statute does not violate the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States. Pages 33-35

ARGUMENT AND CITATION OF AUTHORITY

I. There being no substantive federal question involved in the instant case, and there having been no determination of any constitutional questions by the lower courts, this Court should deny the Writ of Certiorari.

A. The Federal Question

> "Final Judgments...by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court...[b]y writ of certiorari...where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution...of the United States..."28 U.S.C. §1257(3)

The Supreme Court will, though, review a decision of a state court only if it affirmatively appears from the record that a federal question was presented to the highest court having jurisdiction,

and that the court's decision on the federal question was necessary to the determination of the case. *Durley v. Mayo*, 351 U.S. 277, 76 S. Ct. 806 (1956). And the federal question must actually have been decided, or it must appear that the judgment as rendered could not have been given without deciding the federal question. *Southwestern Bell Telephone Co. v. State of Oklahoma*, 303 U.S. 206, 58 S. Ct. 528 (1938). For where it appears that the judgment of the highest court might have rested on a non-federal basis, the Supreme Court will not review the judgment. *Stembridge v. Georgia*, 343 U.S. 541, 72 S. Ct. 834 (1952).

B. Raising the Question, and Decision Thereon. The burden of properly raising the federal question rests on the party alleged to be aggrieved, and when the highest state court has failed

to pass on a federal question, there is a presumption that the failure was owing to a want of proper presentation in the state courts, unless the contrary can be affirmatively shown. *Street v. New York*, 394 U.S. 576, 89 S. Ct. 1354 (1969). And if the issue was not presented to the state courts in such a manner as to make necessary a decision by the highest state court, the United States Supreme Court will not consider the issue. *Ibid.* The United States Supreme Court will not review what the state court did not decide. *Walters v. City of St. Louis*, 347 U.S. 231, 74 S. Ct. 505 (1954); *Dothwell v. Brickbee-Mears Co.*, 275 U.S. 274, 48 S. Ct. 124 (1927). In the case sub judice, there were allegations of unconstitutionality, but they did not set forth with sufficient particularity and clarity the particular sections of the Constitution

alleged to be violated, nor in what way the provisions of the Constitution were violated and the allegations did not, therefore, constitute a proper raising of the federal question. See: *West v. Frick Co.*, 183 Ga. 182, 187 S.E. 868 (1917); *Head v. Edgar Bros. Co.*, 187 Ga. 409, 200 S.E. 792 (1939); *Manufacturer's Trust Co. v. Wilby-Kinsey Service Corp.*, 204 Ga. 273, 49 S.E. 2d 514 (1948); *Aiken v. Richardson*, 207 Ga. 735, 64 S.E. 2d 54 (1951), error transferred 85 Ga. App. 180, 68 S.E. 2d 228, appeal dismissed 344 U.S. 802, 73 S.Ct. 15, rehearing denied 344 U.S. 905, 73 S.Ct. 282. The question must have been raised in the trial court, a ruling must have been made on the question, and it must be brought to the highest court of the state for review. *Aiken v. Richardson, op cit. supra.* Nor was any federal question passed upon in the Supreme Court of Georgia. And if it

appears that the judgment may have rested on a non-federal ground, and such ground was not used to evade the federal question, the Supreme Court of the United States should not review the judgment. *Stembridge v. State of Georgia, supra.*

II. There was no final determination of liability of the Petitioner, Billy West Dasher, at the time of the action of the September, 1970, Grand Jury, and there was, therefore, no denial of Due Process of Law to the Petitioner.

A. The State Law. GEORGIA LAWS 1895 p 63 (GA. CODE ANN. §89-9907) provides that:

> "...any ordinary, member of any board of commissioners, county judge, or justice of the peace, who shall be charged with malpractice in office, or with using oppression or tyrannical partiality, or with wilfully refusing or failing to preside in or hold his court at the regular terms thereof, or with using any other means to delay or avoid the due course or procedding of law..."

shall if convicted of such charges, be punished as for a misdemeanor and removed from office. And GEORGIA LAWS 1967, pp 858, 859 (GA. CODE ANN. §89-9908) provides for notice and an opportunity for

statement and appearance before the grand jury. GEORGIA LAWS 1943, pp 284, 287 (GA. CODE ANN. § 40-1617) extends these rights to state officials. There is not, however, any indication of any intent, legislative or judicial, to extend these rights to any parties other than those specified. The legislative intent as to the county officials who are entitled to the benefit of the section is clear, for it specifically names certain officials, and specifies the charges under which they may exercise the privileges. GEORGIA LAWS 1895, p 63 (GA. CODE ANN. §89-9907). And the applicable privileges to be exercised refer to "the preceding section". GEORGIA LAWS 1967, pp 858, 859 (GA. CODE ANN. § 89-9908)

A county officer is one who: (1) is elected by the qualified voters of the county; (2) holds his office for four

years; (3) is removed from office upon conviction of malpractice; (4) has been a resident of the county for two years; and (5) is a qualified voter. GA. CODE ANN. §2-7901. The Petitioner, the Tax Commissioner of Lowndes County, clearly fits all of such requirements, and he is, therefore, a county official. As a county official, he is not a state official as contemplated by the Constitution of the State of Georgia. GA. CODE ANN. §2-3101. And while county officers have been referred to as constitutional officers, they still are not "elective officers" within the meaning of the Constitution. GA. CODE ANN. §2-2301; *Houlihan et. al. v. saussy et. al*, 206 Ga. 1,5; 55 S.E.2d 557 (1949). Thus, a Clerk of the Superior Court is a county officer. *McGill v. Simmons*, 172 Ga. 127, 157 S.E. 273 (1931). And a member of the

board of commissioners is a county officer. *Sweat et. al. v. Barnhill et. al*, 171 Ga. 294, 157 S.E. 273 (1930). County officers include the Ordinary, the Clerk of the Superior Court, the Sheriff, the Tax Receiver and the Tax Collector. *Houlihan et. al. v. Saussy et. al.*, 206 Ga. 1, 55 S.E.2d 557 (1949); GA. CODE ANN. §2-7902; *Laurens County v. Keen*, 214 Ga. 32, 102 S.E.2d 697 (1958). Thus, since the Petitioner is not a state official, he cannot rely on the provisions of Code Section 40-1617; and the privileges afforded by Code Sections 89-9907 and 89-9908 must be afforded to him, if at all, in his capacity as a county official. But Petitioner is not entitled to the benefits of Code Sections 89-9907 and 89-9908, first of all, because he is not an official designated in Code Section 89-9907 as one entitled to the benefits of the

sections. See: *Jones v. Mills*, 216 Ga. 616, 118 S.E.2d 484 (1961).

Secondly, Petitioner is not entitled to the benefits of Code Section 89-9907 and 89-9908 for the reason that he was not charged with an act specified in Section 89-9907. Section 89-9907 and 89-9908 refer to, and apply to, only certain specified offenses, and if Petitioner was not charged with one or more of the specified offenses, he is not entitled to the benefits of the sections. An official, otherwise entitled to the benefits of the code sections, will not be afforded the sections if he is charged with some crime or act other than malpractice or some act particularly specified in Code Section 89-9907. *Clinkscales v. State*, 102 Ga. App. 670, 675, 117 S.E.2d 229 (1960); *Abercrombie v. State* (No. 46462, Court of Appeals, January 10, 1972). For Code

Sections 89-9907 and 89-9908 primarily "...relate to malpractice of certain [emphasis mine] county officers...and the manner in which they are prosecuted." *Sweeney v. Balkam*, 219 Ga. 292, 293, 133 S.E.2d 10 (1963).

Petitioner was not entitled to the provisions of Code Sections 40-1617, 89-9907 and 89-9908 because (1) he is not a state official; (2) he is not a county official designated in the code sections; and (3) he was not charged with some act specified by the code sections.

The Petitioner, by virtue of Georgia Laws 1931, p. 518, et. seq., is charged with the combined duties of Tax Receiver and Tax Collector.

> "Sec. 8. Said tax commissioner whether elected or appointed, shall perform each, every and all of the duties now required by law of both the tax collector and tax receiver of Lowndes County Georgia, and in the manner prescribed by law; shall be subject

> to all the pains and penalties, and have all the rights, powers, and privileges of said two offices and officers."

A grand jury "...has no right in the absence of specific statuatory authority [emphasis mine] to return a report charging or casting reflections of misconduct in office upon a public officer or impugning his character, except by presentment or true bill of indictment..." *Kelly v. Tankesley*, 105 Ga. App. 65, 123 S.E.2d 462 (196.). That case went on to say "This is not to infer, however, that the Grand Jury in exercising the investigative powers of a civil nature, specifically delegated to it by statute, may not make fair reports of its findings, even though such reports of necessity incidentally reflect negligence or incompetence, upon the officials involved." *Id.* at 66. Thus the grand jury in the instant case could make fair reports of

its findings, even though those findings might incidentally reflect negligence or incompetence on the Petitioner, even without statuatory authority. But there is statuatory authority for the action of the grand jury. The grand jury is charged with the duty of inspecting the books and records of the Tax Commissioner, and with reporting thereon by general or special presentment. GA. CODE ANN. §92-5105; *and see* §§59-301, 59-315, 59-601, 92-4908. And if the grand jury, upon inspection of the Tax Commissioner's books and records, finds a violation or failure to perform, they may assess a penalty against the Tax Commissioner. GA. CODE ANN. §92-5106.

Code Section 92-5106 provides the specific statuatory authority, required by the *Tankesley* case, for the action of the grand jury. The presentments made by the grand jury were authorized by both the

general laws of the state providing for report and presentment on the condition of the various county offices and by the provisions of Code Chapter 92-51 for the assessment of the penalty in the event of sub-standard action, or non-action, on the part of the Tax Commissioner. Thus, even though the presentments and penalty, brought by the statuatory authority required by the *Tankesley* case, may necessarily reflect or infer negligence or incompetence on the part of the Petitioner, they do not charge him with malpractice or some other act specified by Code Section 89-9907, and they are within the bounds of the *Tankesley* case. The grand jury should not have assessed the penalty against Petitioner without a setting forth of the grounds and reasons for the action and, having found the conditions which justified the penalty authorized specifically by statute, they

should have, and did, make a fair report, by presentment, on the condition which resulted in the penalty assessment. The only substantive objection made by the Petitioner to the presentments goes, not to the truth or accuracy of the conditions found by the grand jury, but to the simple reference to an assumed quotation relative to proposed tax sales. It has been nowhere shown that the facts set forth in the grand jury presentments are, in any way, untruthful or inaccurate, and it cannot be reasonably argued that a truthful setting forth of facts, in a grand jury presentment, could be said to be excessive or unnecessary. On the contrary, Respondents submit that the grand jury would itself have been negligent had it not found, and shown by presentment, sufficient facts to authorize and justify the penalty it assessed against the Petitioner.

But Petitioner's liability was not fixed, nor even necessarily determined, upon the issuance of the grand jury's actions. Upon the happening of that event, the Petitioner could either have paid the forfeiture or he could have, as he did, done nothing. If the Tax Commissioner who is made subject to the action of a grand jury fails to pay the penalty imposed, it is enforced against him and his securities by the State Revenue Commissioner, under the provisions relative to defaulting tax collectors, with twenty percent penalty of the amount to be forfeited added thereto. GA. LAWS 1884-85, p.86 (GA. CODE ANN. §92-5106). The State Revenue Commissioner issues his execution against the Tax Commissioner for the amount specified. Acts 1823, Cobb 1025, GEORGIA LAWS 1889, p.52 (GA. CODE ANN. §92-5504). But at any time after the

issuance of the execution and before any sale under the execution, the Tax Commissioner may file an affidavit of illegality to the execution, setting forth any defenses he may have to the execution, and the matter is then tried in the superior court of the county in which the tax collector held office. GEORGIA LAWS 1915, p.55 (GA. CODE ANN. §92-5505). At the time of the grand jury's action, then, the liability of the Petitioner was no more than that of an individual who has been sued in a civil suit or who has been made the subject of a true bill of indictment. In both cases, upon a later hearing of the matter, the defendant or the person against whom the true bill of indictment is returned may be completely exonerated.

B. Due Process. Throughout his argument, Petitioner seems to be assuming that

the action of the grand jury, in assessing a penalty under Georgia Laws 1884-85, p.86 (GA. CODE ANN. §92-5106), automatically and irrevocably fixes his liability, without recourse. But, as pointed out in Paragraph A above, this is simply not the case. Even after notification, by whatever means, of the grand jury's action, Petitioner could simply ignore the forfeiture. If he continued to ignore it, the State Revenue Commissioner may, and did, issue execution against him, under clear statuatory authority. But even then the Tax Commissioner's liability is not fixed for he may, by a reasonable pursuit of his rights, and before a sale or seizure of any of his property, file the requisite affidavit of illegality, and have the matter submitted for a full evidentiary hearing. Due process of law does not necessarily require a judicial

procedure. *Pittsburgh Railway Company v. Backus*, 154 U.S. 421, 14 S.Ct. 1114 (1894); *Turpin v. Lemon*, 187 U.S. 51, 23 S.Ct. 20 (1902).

> "The due process clause does not guarantee to the citizen of a state any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice and opportunity to be heard and to present his claim as defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it."

Reetz v. Michigan, 188 U.S. 505, 508, 23 S.Ct. 390 (1903). *And see: McDonald v. Oregon Railroad and Navigation Co.*, 233 U.S. 665, 34 S.Ct. 772 (1914). The right to notice and an opportunity to be heard must, of course, be "granted at a meaningful time and in a meaningful manner". *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187 (1965). But the statute here grants the right to a hearing under the proper circumstances. Opportunity is

given for a full evidentiary hearing prior to any sale or deprivation of property; it is given before the final liability of the Tax Commissioner is fixed; and it is given under circumstances where it is possible for the Tax Commissioner to raise any defense to the matter he deems appropriate. The requirements of due process are met. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971). It is, of course, true that a procedural rule that may satisfy due process in one context may not necessarily satisfy due process in every case. *Bell v. Burson*, 402 U.S. 535 (1971). But it is also true that in special circumstances, or under special conditions, special rules of procedure may be involved without denying due process. *Boddie v. Connecticut*, 401 U.S. 371 (1971);

Bell v. Burson, 402 U.S. 535 (1971); *Phillips v. Commissioner*, 283 U.S. 589 (1931); *Central Union Trust Co. v. Garvan*, 254 U.S. 554 (1921); *Fahey v. Mallonee*, 332 U.S. 245 (1947). The continued, legal, efficient operation of a governmental office, particularly involving the collection of revenues which form the great percentage of operatirg revenues for a county, is a special circumstance, requiring the utmost in diligence and attention to legal duty. When that standard is not met, there must be resources to cope with the situation. The code sections allowing the forfeiture provide such a means, and, by providing for the affidavit of illegality and a hearing, before an impartial body, they provide such a means within the framework and intent of the due process clause of the United States Constitution.

III. Lowndes County having had no

control over the proceedings of the September, 1970, Grand Jury, and no control over the proceedings subsequent to the action of the September, 1970, Grand Jury, it was not a proper party to the case sub judice.

Under Georgia Law, a County is a body corporate, and as such, it has the power to sue and be sued. GEORGIA LAWS 1863-64, pp. 72,73 (GA. CODE ANN. §23-1501). But a county is not liable to suit unless it is expressly made so by statute. GA. CODE ANN. §23-1502. Being a political subdivision of the State, a county may not be sued unless it is made expressly subject to suit by statute or, in some limited cases, by necessary implication. *Mills v. Chatham County*, 27 Ga. App. 223, 109 S.E. 628 (1921); *Decatur County v. Prather & Co.*, 162 Ga. 929, 931, 137 S.E. 247 (1931). And the law is very

clear that "[i]t is incumbent upon the person filing the suit to show that his case is within the legislative authority permitting suit." *Ayers v. Franklin County* 73 Ga. App. 207, 36 S.E.2d 110 (1945); *See also: Millwood v. Dekalb County*, 106 Ga. 743, 32 S.E. 577 (1899) and *Wood v. Floyd County*, 161 Ga. 743, 131 S.E. 882 (1926). In the instant case, the Petitioner has only shown that correspondence was had with the office of the State Revenue Commissioner, notifying the Commissioner that the fine imposed by the Grand Jury on the Petitioner had not been paid, and notifying, or requesting the Commissioner that he proceed with the issuance and collection of an execution against Petitioner. But Lowndes County, acting through its Board of Commissioners, and employees, has not only the right but also the duty to see to matters which

affect the County. GEORGIA LAWS 1964, Extra Sess., pp.26, 198 (GA. CODE ANN. §23-701); GEORGIA LAWS 1877, p.109 (GA. CODE ANN. §23-702); GEORGIA LAWS 1875, p. 107, 1876, p.109 (GA. CODE ANN. §23-703); GEORGIA LAWS 1922, pp.82, 84 (GA. CODE ANN. §23-904). *Williams v. Sumter County*, 151 Ga. 402, 107 S.E. 518 (1921); *Armistead v. MacNeill*, 203 Ga. 204, 45 S.E.2d 652 (1947). The mere request of a governmental entity, or a private citizen for that matter, that another public official perform his duty, does not make the requesting entity or private citizen responsible or answerable when the requested official does perform his statuatory duty as requested. To allow such a situation could result, theoretically, in a private citizen who requested of a Tax Commissioner a sale and levy to collect taxes, responsible to the person whose property was sold for the manner in which the Tax

Commissioner did, or did not, collect the taxes and conduct the sale. The responsibility of performance, or non-performance of a statuatory duty rests solely upon the official charged with the duty. The State Revenue Commissioner properly performed his statuatory duty when he was requested or notified by the County or one of its employees to do so. *See*, GEORGIA LAWS 1884-85, p.66 (GA. CODE ANN. §92-5106) and GEORGIA LAWS 1915, p.55 (GA. CODE ANN. §92-5504). It would, at best, be unreasonable to assume that the State Revenue Commissioner would have knowledge of the grand jury's action without notification or request from someone, and the entity in the best position to be aware of the failure to pay the fine, other than the Petitioner himself, would be an officer or employee of the County. It could certainly be reasonably argued that

the Petitioner would not request the Commissioner to do his duty.

Other than, possibly, mandamus, Lowndes County had no authority over whether or not the State Revenue Commissioner performed his duty, or in what manner he performed it. The Commissioner did issue an execution against the Petitioner, and it is submitted, properly so. But the mere request or notification to the Commissioner did not, and does not, give the County any authority or control over the actions of the State Revenue Commissioner.

Nor did, or does, Lowndes County have any authority over the proceedings of the grand jury. A grand jury is generally regarded as a part of the court and supervision of the court, as an arm of the law and a part of the machinery of government; and the grand jury as a body, and its members individually, are not subject to

liability for their actions in the performance of grand jury duties. 38 C.J.S., *Grand Juries*, §45; CODE OF GEORGIA 1933 §105-807; *Thornton v. Marshall*, 92 Ga. 548, 17 S.E. 926 (1892); *Cook v. Sikes*, 210 Ga. 772, 82 S.E.2d (1954).

Having no authority or control over either the actions of the grand jury or the State Revenue Commissioner, Lowndes County should not have been continued as a party defendant in this case. Even if Lowndes County had authority or control over the actions or proceedings of the grand jury or the State Revenue Commissioner, there is no provision of law, either by statute, case, or necessary implication, which would authorize the bringing of suit against Lowndes County; the Petitioner has not shown, or attempted to show, that he has any such authority for suit; and all proceedings against Lowndes County should have been dismissed.

IV. The law under which the September, 1970, Grand Jury acted being available to all grand juries in Georgia, and the law being applicable to all Tax Commissioners, the mere enforcement of the statute does not violate the Equal Protection of Law clause of the Fourteenth Amendment to the Constitution of the United States.

A traditional test for the possible denial of equal protection of laws is whether a classification of persons or rights rests on grounds wholly irrelevant to achievement of valid state objectives. *Turner v. Fouche*, 396 U.S. 346, 90 S.Ct. 532 (1970) Equal protection is secured by laws which operate on all persons within the category alike, without discrimination. *Garmon v. State*, 219 Ga. 575, 134 S.E. 2d 796 (1964); *Dansby v. Dansby*, 222 Ga. 118, 149 S.E.2d 252 (1966). The right to equal protection

of laws is not a right to any specific treatment, but is simply the right of the individual to receive the same treatment as that received by others within the same category. *Heymann v. State of Louisiana*, 269 F.Supp. 36 (1967). To show that there has been a denial of equal protection of laws, a person must show an intentional or purposeful discrimination. *Whitney Stores, Inc. v. Summerford*, 280 F.Supp. 406 (1968), aff. 393 U.S. 9, 89 S.Ct. 44. Mere laxity, delay or inefficiency in the enforcement of an otherwise valid statute does not destroy the law, and selective enforcement does not violate equal protection of laws if it has a reasonable relationship to the purposes for which the legislation was established. *S. S. Kresge Co. v. Davis*, 277 N.C. 654, 178 S.E.2d 382 (1971). It is only in those instances where laws are applied differ-

ently to different persons under the same or similar circumstances that the equal protection of the law is denied. *Hunter v. City of Atlanta*, 212 Ga. 179, 91 S.E. 2d 338 (1956). The Petitioner has not shown, but has only alleged, that the provisions of the statutes employed by the Grand Jury of Lowndes County, has not been employed elsewhere; he has not shown that the Lowndes County Grand Jury has had occasion to use the law on other occasions, on other individuals, and has failed to do so; he has not shown any purposeful or intentional acts on the part of the Lowndes County Grand Jury to indicate that they have, or would, treat other persons any differently from their actions toward him; and, it is respectfully submitted, he has not, therefore, shown any denial of Equal Protection of the Law under the provisions of the U. S. Constitution.

CONCLUSION

There is, properly, no substantial federal question involved in the case before the court. The matter is simply one involving state law procedures which, in any event, conform to constitutional guidelines. Neither the trial court nor the Supreme Court of Georgia passed upon any alleged constitutional questions, both because the questions were not properly raised and, it is submitted, because there has been no violation of constitutional rights.

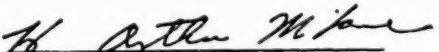
Even if constitutional questions had been properly raised, there has been no denial of the Petitioner's rights. Due process has not been denied for the reason that the Petitioner has ample opportunity, under existing state law, for timely notice and hearing before his lia-

bility, if any, is finally fixed. Equal protection of the law has not been denied for the reasons that the statute involved is a reasonable categorization and there is no indication that the Petitioner has been the subject of any discriminatory action on the part of the grand jury or that he has been treated in any manner differently from that which would be the case with any other Tax Commissioner in similar circumstances.

Lowndes County was not a proper party to these proceedings since it had no authority or control over the proceedings of either the grand jury or the State Revenue Commissioner.

Accordingly, it is submitted that the judgment of the Supreme Court of Georgia was correct in every respect and that the Writ of Certiorari should be denied.

Respectfully submitted,



H. Arthur McLane

CERTIFICATE OF SERVICE

I certify that I have served the above and foregoing Response to Petition for Writ of Certiorari to the Supreme Court of Georgia by depositing the same in the United States Mail, in a properly addressed envelope with sufficient postage thereon for delivery, to:

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This 12 day of December, 1972.

H. Arthur McLane